



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11419/2016

THE IMMIGRATION ACTS

Heard at Newport
On 14th August 2018

Decision and Reasons Promulgated
On 28th August 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

UMER SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shahzad acting in person.
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mr Shahzad, appealed the First-tier Tribunal decision, promulgated on 14th September 2017, dismissing his human rights appeal. The Secretary of State had refused his human rights application on 13th April 2016.
2. The grounds for permission to appeal were settled by the appellant himself stating that he had no idea how the system worked, it was unfair that the Secretary of State had handed him a bundle at the outset of his case for the first-tier Tribunal and he did not have time enough to read it properly. The appellant had been living in the United Kingdom for 6 ½ years and his circumstances at home had changed dramatically. Everything had been sold and invested in his education. His wife was

running a business and he needed to look after his son and growing family. His wife was not willing to return.

3. First-tier Tribunal Judge Gibb identified that the judge found and granted permission only on the basis that the ETS deception allegation was found by the judge to have not been made out but the judge had not referred to Ahsan and others v SSHD [2017] EWCA Civ 2009 which accepted that an appellant should be restored to the position he or she would have been in but for the impugned decision where an appeal found the deception not to be proved. It was stated that it was arguable that the judge erred in law in not considering '*the consequences of that ETS decision and the position the appellant would have been in if it had not happened, since the proportionality assessment she conducted, on its own terms was clear any arguable error, only focused on his current circumstances*'.
4. The appellant is a Pakistan national born on 20th February 1988. The appellant entered the United Kingdom as a Tier 4 student in 2011 and made further applications on the same basis and was granted leave until 30th April 2014. On 4th April 2014 the appellant submitted a further application to remain on the same basis and that was refused on 11th September 2014 with no right of appeal in country. The appellant was served with form IS151 for obtaining leave by deception on 29th March 2015. His application for judicial review was refused permission. On 13th April 2016 the appellant's application for further leave to remain was refused on human rights grounds and at the same time a notice was served by way of directions pursuant to section 10 of the immigration and Asylum Act 1999.
5. First-tier Tribunal Judge MM Thomas noted that the appeal was confined to whether the refusal was in breach of his human rights and, further, that the Secretary of State had refused his application on the basis of an established family life pursuant to appendix FM and private life grounds – paragraph 276 ADE of the immigration rules. The judge noted that the appellant needed to fulfil the requirements of R – LTRP.1.1. It was the respondent's case that the appellant could not meet the suitability requirements because he had practised deception. The judge proceeded to make a full analysis of whether the appellant had indeed practised deception and found that the respondent had not discharged the legal burden to show that appellant had done so. On this basis the judge found at paragraph 54 that the suitability requirements would have been met when considering either the family or private life applications.

The Hearing

6. At the hearing, the appellant advised that he had now another child, that he had nothing at home to return to and his wife was unwilling to return to Pakistan. She was in the process of making an application for

indefinite leave to remain because she had been in the United Kingdom for 10 years.

7. Mr Mills referred me to Ahsan and specifically in paragraph 133 which he asserted had been misconstrued. In his view there was no arguable error of law.

Conclusions

8. No permission was granted in relation to the point of an adjournment. It is clear from the decision that the judge put the matter back on the basis of late evidence from both parties, and so that from the Secretary of State could be considered by the appellant and evidence from the appellant could be considered by the Secretary of State. I can discern no unfairness in this approach.
9. The judge rightly identified that, in fact, this was a human rights appeal. The position regarding the ETS deception had been litigated and the appellant's application for judicial review refused by upper Tribunal Judge Freeman in 2015. None the less the judge proceeded to consider the matter as part of the facts to be taken into account under the article 8 assessment.
10. The appellant's leave was due to expire on the 30 April 2014 and his leave in the United Kingdom was precarious and there was no guarantee that any leave would be extended even if he met the suitability requirements. As Mr Mills pointed out in relation to Ahsan there was acknowledgement recorded at paragraph 133 that the Secretary of State to take whatever steps were possible to restore successful out of country appellants to the position that they would have been but for the impugned decision'. Mr Mills submitted that the appellant had had, in effect, had an in country right of appeal on the point deception and had been successful.
11. The appeal that was before the judge was in relation to the application on human rights grounds. It was not an appeal against the refusal of the Tier 4 application of 4 April 2014. In my view the judge rightly considered that the suitability provisions were not made out but the judge also noted at paragraph 55 that the partner Mrs Hashem could not meet the definition of partner for the purposes of the relationship requirements pursuant to paragraph E - ECP 2.1 as she is not a British citizen, nor present and settled in the UK or in the UK with refugee or humanitarian protection. The judge found

'on that basis the appellant cannot succeed pursuant to paragraph R-LTRP.1 .1 of the rules, the provision of the Rules that would apply to the Appellant's circumstances. For that reason I have not gone on to consider EX.1 albeit it is now accepted that the relationship is genuine and subsisting'.

12. The judge at paragraph 56 considered the claim in relation to private life and paragraph 276 ADE and acknowledged that the appellant, as he had not been in the UK for 20 years, would have to show “*very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK*”. The judge directed himself appropriately noting that the appellant had lived in Pakistan far in excess of the years that he has lived in the UK, he came to the UK as a student, he is highly educated, he undertook his BSc in Pakistan, and the judge found, he could

‘identify no issue with either social or cultural integration in Pakistan for these reasons, paragraph 276 ADE was and is not engaged’.

13. Those findings open to the judge and he gave adequate and sustainable reasons for making those findings on the evidence. He clearly did not accept that the appellant would fail on the grounds of suitability because of the finding of deception which had been overturned. Simply, however, the appellant could not meet the Immigration Rules which would be a factor (reflecting the position of the Secretary of State) when considering the appeal proper on human rights grounds.

14. The judge then proceeded to consider the matter under Article 8 noting that it was a matter of choice for the appellants partner as to whether or not she wished to accompany him to Pakistan [60]. The judge noted that she had leave to remain in the United Kingdom and her extended family including her parents were in the United Kingdom but in line with Agyarko [2017] UKSC 11, the judge considered whether there were any unjustifiably harsh consequences resulting from the decision. As obliged to do the judge applied section 117 of the Nationality Immigration and Asylum Act 2002 (as amended), the finding the appellant had always had lawful status but identifying that the appellant’s leave had also always been on a student basis and he would have been aware that it would never have led to settlement. The judge was entitled to attach little weight to the family and private life established and developed when considering this factor in the proportionality balancing exercise [66].

15. The child M was a not a qualifying child at the age of 14 months but nonetheless the judge considered his best interests and the wider interests of the family with Beoku-Betts [2009] UKHL 38, in mind. The judge also found in relation to the appellant’s British citizen mother and her ill health (diabetes and memory problems), that there was no explanation given as to why the appellant’s father and brother, who were both British citizens, or the sister, could not care for her in the UK. Overall the judge found that the appellant and his partner were ‘educationally very well qualified and they could undoubtedly settle anywhere in Pakistan that they wished and obtain employment’ [70]. That finding was open to the judge.

16. Overall the judge was well aware of his own finding on the ETS point but found on **all** the evidence presented, either in relation to the appellant or his family no compelling circumstances which would result in unjustifiably harsh consequences to them if removed to Pakistan. The judge explored the contents of the appeal with which he had been charged noting that the appellant did not and could not satisfy the provisions of the rules and as such there had not been a sufficiently strong compelling claim to outweigh the public interest.
17. It was not open to the judge to make a decision on the previous Tier 4 application. It was not for the judge to make a finding on the success or otherwise of the previous Tier 4 application which had fallen at the first hurdle of suitability. There was still no confirmation as to its success because there are various elements to the Rule to be satisfied. That was the position before the judge. The judge could only make a decision on the facts before him which included that the ETS deception point was found in favour of the appellant. The judge clearly factored into the scenario that the appellant's family life could be continued in Pakistan, the that he had formerly lived in Pakistan, without his family without the support of his wife and the qualifications. The wife did not have settled status and could make a choice as to whether to join him or not with the child. Even absent the factor of the ETS deception, following which the judge clearly found that the appellant could fulfil the suitability requirements, there were no compelling circumstances in the human rights claim. Particularly the appellant nor his immediate family had never had anything other than precarious status and could not have a firm expectation of being able to settle in the United Kingdom.
18. It was the appellant's case before me that his wife had now applied for indefinite leave to remain, but this was not a factor before the judge. It may be that the appellant would wish to have the Tier 4 application reopened by the Secretary of State in view of the findings of the judge or alternatively may wish to make a further human rights application on the basis that his wife has indefinite leave to remain.
19. As such the decision of the First-tier Tribunal shall stand as it contained no material error of law

Signed

Helen Rimington

Date 16th August 2018

Upper Tribunal Judge Rimington